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2 Teleconference

3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF NEW YORK5 -----x
6 PETER ALLEN, *on behalf of*
7 *themselves and others*
8 *similarly situated, et al.,*
9 Plaintiffs,

10 v.

11 19 CV 08173 (LAP)

12 CARL KOENIGSMANN, MD, *et al.*,
13 Defendants.14 -----x
15 New York, N.Y.
16 August 9, 2023
17 1:00 p.m.

18 Before:

19 HON. LORETTA A. PRESKA,

20 District Judge

21 APPEARANCES

22 LAW OFFICE OF AMY JANE AGNEW
23 Attorneys for Class Plaintiffs
24 BY: AMY JANE AGNEW
25 JOSHUA L. MORRISON26 WHITEMAN OSTERMANN & HANNA
27 Attorney for Defendant Moores
28 BY: ORIANA KILEY
29 WILLIAM NOLAN
30 GABRIELLA LEVINE
31 JENNIFER THOMAS

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1 MS. AGNEW: Good afternoon. A.J. Agnew, Josh
2 Morrison, and we also have some law students.

3 THE COURT: Wonderful. Good afternoon. Who is on for
4 the defense side, please.

5 MS. KILEY: On behalf of Dr. Moores, Oriana Kiley.
6 I'm joined by my colleagues Will Nolan, Jennifer Thomas, and
7 Gabriella Levine.

8 Good afternoon, your Honor.

9 THE COURT: Good afternoon.

10 Folks, I assume you've seen the Court of Appeals
11 vacating the stay.

12 MS. KILEY: Yes, your Honor.

13 MS. AGNEW: We have, your Honor.

14 THE COURT: What would you like to do now, friends?

15 MS. AGNEW: This is A.J. Agnew on behalf of the
16 plaintiff class. Certainly, we'd like to get new trial dates.
17 But I do have two things I want to address before that, if I
18 could, please.

19 THE COURT: Yes, ma'am.

20 MS. AGNEW: So, as the Court is aware, last week,
21 Defendant Moores took the deposition of approximately
22 20 prisoners and injunctive class members. It quickly became
23 apparent during those depositions that the state has endeavored
24 to treat these patients, which we are of course thrilled about,
25 but some of them, in fact, were given their medications back

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1 the day before the deposition.

2 We also note for the record that even though there was
3 a prohibition against using the medical records of these
4 patients that had not been produced by July 15,
5 Defendant Moore's counsel was incredibly aware of the details
6 of their recent treatment, including the fact that they had
7 been prescribed drugs just the day before when we hadn't even
8 had a chance to talk to our plaintiffs and find that out. They
9 knew things like, isn't it true you got a back brace last week?

10 So, certainly, they are allowed to prepare their case
11 by calling their providers, but we're concerned about the
12 spirit of the order, which is that if we didn't have access to
13 medical records, they shouldn't have access to medical
14 information.

15 But in light of these changes, it seems they have
16 endeavored to moot out – although that's not how the case law
17 works – our witnesses who we have ready to testify. And in
18 light of that, we seek permission from the Court to name 12 new
19 witnesses, to swap them out for 12 of the ones that they have
20 treated at the 11th hour before what they propose was going to
21 be the trial date.

22 We also note for the record that Mr. Morrison went
23 this morning to Fishkill Correctional Facility because about a
24 week ago, Mr. Daniels was attacked while he was in the
25 medication line under the suggestion that he was trying to get

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1 a second dose of his Lyrica. That's not what happened. But he
2 was maced by the officers. He was then given two tickets and
3 thrown in the SHU at Fishkill. When he arrived at Fishkill, he
4 was told we don't give Lyrica here. Mr. Morrison just left his
5 side and had a face-to-face meeting with him. We wanted to
6 make sure he was physically okay. He does seem to be okay
7 other than some bumps and bruises, but he is not getting his
8 medication.

9 We're upset about this because Mr. Daniels is a quiet,
10 unassuming guy. He really worked with counsel, put together
11 this case since its inception, and he's not a rabble-rouser. I
12 don't know why this happened to him. I'm very unhappy about
13 it. But we have to impress upon Defendant Moore's counsel that
14 he needs his Lyrica, and he needs it now.

15 THE COURT: Ms. Kiley.

16 MS. KILEY: Your Honor, when we went into our
17 depositions last week, we had done our due diligence in
18 preparation for trial, and we did indeed speak to the provider
19 up until the middle of that week. We thought the trial was
20 going to proceed. Like I said, we did what we could to contact
21 as many providers to prepare for trial. To the extent counsel
22 believes we obtained other medical records, that's not true.
23 Any information we received in preparation for the deposition
24 was essentially our preparation for trial.

25 THE COURT: I don't quite get that. I don't get that

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1 part. Please say that again. Are you saying to me that you
2 didn't review any medical records, but you talked with the
3 providers about medical events that took place after July 15?
4 Is that what you're telling me?

5 MS. KILEY: Yes.

6 THE COURT: So do you think that was a way to avoid
7 the ruling that the Court made with respect to medical records
8 after July 15?

9 MS. KILEY: No, your Honor. My understanding was that
10 the order to produce those documents was still going to happen,
11 except that the documents itself could not be used as evidence
12 in trial in order to prepare --

13 THE COURT: You were permitted to interview the
14 providers to get the information that is included in the
15 medical records that may not be entered as evidence at trial;
16 is that what you're telling me?

17 MS. KILEY: Your Honor, we reached out to the
18 providers to find out what was the --

19 THE COURT: You're telling me --

20 MS. KILEY: -- current status of their --

21 THE COURT: Yes or no?

22 MS. KILEY: Can you repeat the question? I'm sorry.

23 THE COURT: Are you telling me that you interviewed
24 medical providers to elicit from them information that would
25 have been, and probably was included, in post-July 15 medical

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1 records, which we know, according to the order, may not be used
2 in the trial? Is that what you're saying, you got the --

3 MS. KILEY: No, your Honor.

4 THE COURT: -- information from the providers but not
5 from the records so as not to contravene the order?

6 MS. KILEY: No, your Honor. We called them to prepare
7 for trial.

8 THE COURT: So what is your explanation, then, as to
9 why you will be able to elicit at trial information from
10 medical records that can't be introduced pursuant to the order?

11 MS. KILEY: Because if we want to call them on
12 rebuttal, we would be asking these providers to testify to
13 their personal knowledge of the care that they give to the
14 patient in question. If they happen to know the exact date
15 that they gave --

16 THE COURT: Counsel --

17 MS. KILEY: -- admitted something --

18 THE COURT: Counsel, counsel. You may not contravene
19 the order. The whole purpose of the order was to permit both
20 sides to have the same medical information in advance of trial.

21 What is your position with respect to the individual
22 suddenly receiving their medication? Was that the goodness of
23 God? Did that come out of the heavens? How did that happen?

24 MS. KILEY: Your Honor, my office did not facilitate
25 any specific care or direction of care to any of the patients.

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1 To the extent they received the medications that they have been
2 asking for, that was due to the communication, we presume, that
3 plays between the patient and the provider. We did not
4 facilitate any of that, as far as my office. And I -- that's
5 all I can say to that. If counsel is upset that -- never mind.
6 I'm sorry. Withdrawn.

7 THE COURT: What is your position with respect to
8 Mr. Daniels?

9 MS. KILEY: Your Honor, I would -- I don't have a
10 position right now. I have no knowledge of exactly what took
11 place other than what counsel has just told us about two
12 minutes ago. And I would hope that the incarcerated individual
13 would communicate with his providers what he needs.

14 THE COURT: Ms. Agnew.

15 MS. AGNEW: Your Honor, first of all, my clients'
16 miraculously getting called down for a visit with their
17 provider a day before deposition, a week before trial, and
18 miraculously getting -- for instance, in the case of
19 Joyce Powell, Neurontin she's been asking for six years is
20 hardly coincidental. I'm not suggesting Ms. Kiley said, give
21 her the Neurontin today, but I'm suggesting that this is
22 improper.

23 It doesn't work to moot our injunctions legally if
24 they look at the case law. I'm not sure whose idea it was.
25 But it puts us in an untenable position of putting 24 people on

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1 the stand who have now been treated in the two weeks before
2 trial, and defense counsel knows the details of that treatment,
3 and we have nothing.

4 I mean, we don't even have the medical record which
5 shows why Ms. Powell would have had a medical encounter with
6 her provider that wasn't previously scheduled or requested.

7 They are kind of sinking their own battleship. But at
8 the same time, I think we should be, one, provided the medical
9 records provided last Friday for all of these people; and two,
10 we should be able to call 12 patients with whom they have not
11 tampered. I'm not saying that it is Ms. Kiley doing it
12 directly, but with whom central office has not tampered in a
13 week before trial.

14 THE COURT: All right. We'll get back to that after
15 we discuss trial dates.

16 What do you want to do, friends?

17 MS. AGNEW: Obviously, your Honor, plaintiff wants to
18 get in there as quickly as possible. We do note it takes a lot
19 of effort to line up these prisoners to testify, on the
20 facility level. So I think anything before two weeks out would
21 be kind of insane for us to complete.

22 THE COURT: Ms. Kiley, what is your position?

23 MS. KILEY: We would agree with that. And we would
24 propose after Labor Day.

25 THE COURT: What are you going to do about the

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1 expiration of the preliminary injunction?

2 MS. KILEY: My understanding is that the preliminary
3 injunction expires on the 10th of September. The trial could
4 proceed on the 5th, the day after Labor Day.

5 MS. AGNEW: Your Honor, if I may. This is A.J. Agnew.
6 I do think there are some polling issues because the
7 preliminary injunction was stayed, which defense counsel didn't
8 take into consideration when they asked for an extension of
9 time on their appeal papers.

10 THE COURT: Remind me how many days it was stayed,
11 please. Was it 30? I'm sorry. I have it in front of me.

12 July 31, and today is the 9th. So what is that? Nine
13 or ten days, something like that? So that's --

14 MS. AGNEW: I would say nine days, your Honor. So
15 we're looking at September 19 now.

16 THE COURT: All right, then. Why don't you -- I think
17 we're probably going to have to do it, then, on the 5th.

18 How long do you expect it to take, my friends?

19 MS. AGNEW: Your Honor, as we had originally
20 indicated, we thought we'd need three days. However,
21 Defendant Moores does want us to bring all these RMDs instead
22 of using their transcripts, and that's her prerogative. So
23 we're thinking four days for our case in chief.

24 THE COURT: Ms. Kiley.

25 MS. KILEY: Your Honor, depending on how many

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1 witnesses are actually called, it will dictate how many
2 rebuttal witnesses we may call. I would guess we would need
3 about two days at most.

4 THE COURT: All right. We will give you from the 5th
5 through and including the 12th.

6 MS. AGNEW: Your Honor, I apologize. This is
7 A.J. Agnew. My call dropped, but I'm back on.

8 THE COURT: Say it again. I'm sorry.

9 MS. AGNEW: My call dropped, but I'm back on. I'm so
10 sorry.

11 THE COURT: Okay. I'm saying the best I can do for
12 you, and I will say it is a great personal sacrifice, is to
13 give you the days of the 5th through and including the 12th.
14 You can't have anything more than that. We have a criminal
15 trial starting the next day.

16 You might want to reconsider bringing in all those
17 RMDs. You want to do that, that's fine.

18 MS. AGNEW: Your Honor, we'll take it, and we'll make
19 it work.

20 THE COURT: If you want to start on the 31st, you can
21 also do that. It's an extra day for you.

22 MS. AGNEW: Let's do this. Let's start on the 5th,
23 your Honor, and we'll cut out some of the cross. We have to
24 fly our expert in, and he's been really gracious, but asking
25 him to come in the day before Labor Day, that will get me in

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1 hot water.

2 THE COURT: Six trial days, figure five hours a day,
3 each of you have half of it. And you can save some for
4 rebuttal, if you want. But just tell me how you want to break
5 it up. All right? We will be timing you, and you have to use
6 your time wisely.

7 Okay. That having been said, what are you going to do
8 about producing those medical records ASAP, Ms. Kiley?

9 MS. KILEY: Your Honor, I was -- my understanding was
10 that the -- I believe it was plaintiff's 14th demand for
11 documents. Ms. Pam Knight was kind enough to facilitate
12 production of what she could. My understanding is that there's
13 still an obligation to produce all of those records, and that
14 we're still working with facilities to produce those records.
15 But the July 15 cutoff date was solely to what could be used at
16 trial.

17 THE COURT: But here's the deal. We will not have any
18 testimony about any medical situations that happened after,
19 during a trial when plaintiffs don't have the medical records.
20 So if you're trying to argue that the case is moot because,
21 miraculously, these people get their medication, first of all,
22 you better read the cases; and second of all, that's not going
23 to be permitted if plaintiffs do not have the medical records.
24 So you better do what you have to do about it.

25 MS. KILEY: Yes, your Honor.

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1 THE COURT: Let me ask you this. Have you gone back
2 and read those mootness cases? Because you really should read
3 them. It isn't that one or two people get their meds.

4 MR. NOLAN: Your Honor, this is Will Nolan for
5 Defendant Moores.

6 THE COURT: Yes, sir.

7 MR. NOLAN: I just want to say at no point have we
8 tried to moot anybody's claim. And at no point has our office
9 been involved in any attempt to try to moot anything.
10 Certainly, that was not evident to us in the depositions that
11 were taking place. The information that we had, to the extent
12 we had it, we were asking questions, and we were getting
13 responses. There was no surprise. Yes, we talked to some of
14 the providers, not all of them, but essentially we were talking
15 to these providers in realtime before these depositions to find
16 out who these people were. So any idea we were trying to moot
17 something is sort of ridiculous.

18 THE COURT: Let me ask you this, Mr. Nolan. As
19 Ms. Agnew said, nobody is saying your office did anything. But
20 I suspect that your clients had a list of the proposed
21 witnesses, and I will be shocked when we see the medical
22 records, if there was any special event that happened that
23 precipitated these individuals receiving their medications
24 after, what I am told at least, was several years of requesting
25 them.

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1 So I'm just asking you folks, take it under
2 advisement. And I'll say again, there will not be any
3 testimony about any medical actions whatsoever for which
4 plaintiffs do not currently or in the next week or two get the
5 medical records.

6 Do we understand each other?

7 MR. NOLAN: Yes.

8 THE COURT: Okay.

9 MS. KILEY: Yes, your Honor.

10 THE COURT: What else do you want to do, friends?

11 MS. AGNEW: I think that's fine, your Honor.

12 In light of that ruling -- this is A.J. Agnew. We
13 don't need the 12 new witnesses. I think that levels the
14 playing field in a significant way, and we will get to work on
15 our scheduling. And I do apologize. We're going to have to
16 bombard you with some more orders to produce.

17 THE COURT: Okay. And my recollection is that
18 Dr. Moores' counsel or Dr. Moores' office was helpful in lining
19 up these folks for their video depositions at the time; isn't
20 that right?

21 MS. AGNEW: I think they did the best they could do,
22 your Honor.

23 THE COURT: Okay. So perhaps they could be helpful
24 again in lining up the folks for their video testimony so that
25 it goes smoothly.

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1 So Ms. Kiley, Mr. Nolan, let me know what orders you
2 need so that you can do this with as little trouble as
3 possible.

4 MS. AGNEW: This is A.J. Agnew again. I think my
5 office is much more efficient at this, and that's no dig on
6 Ms. Kiley and Mr. Nolan. But why don't we just reach out to
7 them if we hit a bump in the road, because generally speaking,
8 my staff are quite good at this.

9 THE COURT: Okay. People, let me know what you need.

10 MS. KILEY: Your Honor, this is Oriana Kiley. Just a
11 question. To the extent that any additional medical records
12 are produced between now and September 5, is the Court going to
13 impose a cutoff date as we did the July 15 date?

14 THE COURT: I will ask for your suggestion on a date.
15 Producing medical records on the morning of September 5 is
16 going to be useless. Don't you think two weeks out?

17 MS. AGNEW: Your Honor, I would propose by the 21st.
18 If we don't have records, then those issues or instances are
19 precluded.

20 THE COURT: Ms. Kiley, is that all right with you?

21 MS. KILEY: That works for me. Thank you.

22 THE COURT: Okay. Good.

23 What do you want to do about Mr. Daniels? Ms. Kiley,
24 do you want to make inquiry and get back to plaintiff's
25 counsel, and then if you people need anything, call me later?

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1 MS. KILEY: We can do that.

2 THE COURT: All right. What else do we need, friends?

3 MS. KILEY: This is Oriana Kiley. Sorry. I just
4 need -- if Ms. Agnew can e-mail me with the patient's name and
5 PIN.

6 THE COURT: We'll have a short date on Monday the
7 11th, so build that into your timing. We'll probably end up
8 going four hours in the morning, and that's it.

9 Anything else?

10 MS. AGNEW: Not from plaintiffs, your Honor. Thank
11 you.

12 THE COURT: All right. Thank you, folks. Let me know
13 about Mr. Daniels. Thank you.

14 (Adjourned)

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